

## ARTICLES

# ONE OF THESE THINGS IS NOT LIKE THE OTHER: NAACP V. ALABAMA IS NOT A MANUAL FOR POWERFUL, WEALTHY SPENDERS TO POUR UNLIMITED SECRET MONEY INTO OUR POLITICAL PROCESS

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*In Citizens United, eight of the Supreme Court's nine Justices reaffirmed the Court's earlier decisions holding that election-related transparency laws are constitutional. Those eight Justices agreed that voters have a right to know who is paying for pre-election ads that mention candidates—"[e]ven if the ads only pertain to a commercial transaction." And they recognized that election spending "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."*

*In the near decade since Citizens United was decided, lower courts have invoked the decision to uphold a wide range of federal and state disclosure laws, rejecting arguments urging a narrow interpretation of the decision. And the Supreme Court has declined subsequent requests to revisit its disclosure holding. In fact, the Court's determination that disclosure requirements are constitutional was critical to the other part of Citizens United, in which a five-Justice majority invalidated the ban on independent, corporate-funded election expenditures. The Court held that disclosure is a "less restrictive alternative to more comprehensive regulations of speech" and predicted the decision would usher in a new "campaign finance system that pairs corporate independent expenditures with effective disclosure."*

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*Decisions from Buckley (1976) to Citizens United (2010) have continued to recognize a singular, limited as-applied disclosure exemption for groups facing a “reasonable probability” of threats, harassment, or reprisals. Historically, that exemption has been reserved for vulnerable groups like the National Association for the Advancement of Colored People (NAACP) in 1950s Alabama—organizations whose members faced violent retribution if their names were disclosed.*

*As attempts to invalidate or limit election-related disclosure laws have failed, well-funded dark money organizations are now seeking a back-door approach—claiming the narrow NAACP exemption for their own anti-transparency objectives. These new efforts generally ignore the factual context for which the NAACP exemption was recognized. They also dismiss the Supreme Court’s recognition that election-related disclosure rules promote the First Amendment rights of American voters to be informed about who is trying to influence their electoral decisions.*

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#### INTRODUCTION

In *Citizens United v. FEC*,<sup>1</sup> eight of the Supreme Court’s nine Justices reaffirmed decades of Supreme Court jurisprudence holding that election-related transparency laws are constitutional. Those eight Justices recognized that disclosure of election expenditures “enables the electorate to make informed decisions and give proper weight to different speakers and messages,” while also providing citizens with important information necessary to hold elected officials accountable.<sup>2</sup> The Justices agreed that voters have a right to know who is paying for pre-election ads that mention candidates, even if the ads do not explicitly advocate for or against the candidate’s election.<sup>3</sup>

Justice Kennedy’s majority opinion predicted that the Court’s disclosure holding, combined with the more controversial part of *Citizens United*, in which a five-Justice majority invalidated the ban on independent corporate- and union-funded election expenditures, would usher in a new “campaign finance system that pairs corporate independent expenditures with effective disclosure.”<sup>4</sup> That prediction could not have been more off-base. While corporate election spending has surely been on the rise, existing laws do not come close to ensuring “effective disclosure,” and ongoing efforts seek to make the election transparency regime even less effective.

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1. 558 U.S. 310 (2010).

2. *Id.* at 369–71.

3. *Id.* at 370–71.

4. *Id.* at 369–70.

In particular, anti-transparency advocates and others who prefer to influence our politics in secret are pursuing litigation, policy, and public advocacy campaigns to create a mechanism to influence the political process in secret, elevating political spenders' preference for anonymity over the well-established right of citizens to make informed decisions at the ballot box. These efforts seek a dramatic expansion of a narrow, as-applied disclosure exemption generally reserved for vulnerable groups like the NAACP in Jim Crow Alabama or the Socialist Workers Party during the early 1980s—organizations that lacked substantial political and economic power and whose members faced violent retribution if their names were disclosed. Recent efforts to invoke that exemption as a basis for avoiding or negating disclosure rules generally ignore the factual context for which the exemption was originally recognized. Anti-transparency advocates also dismiss the Supreme Court's recognition that election-related disclosure rules are uniquely important because they promote American voters' First Amendment right to be informed about who is trying to influence their electoral decisions.<sup>5</sup>

This Article surveys the variety of strategies that powerful, anti-transparency advocates are employing to undermine election-spending transparency laws and co-opt the disclosure exemption for marginalized groups facing serious threats and harassment. First, it traces the history of the Supreme Court's campaign finance disclosure decisions, which have uniformly upheld transparency requirements for spending on election-related advocacy. Second, it describes the origins of the disclosure exemption for vulnerable groups like the NAACP in the 1950s—groups whose members faced serious threats, harassment, or retaliation if identified and for whom disclosure thus compromised the exercise of First Amendment associational rights. It also explains how the Supreme Court and lower courts have applied this “NAACP exemption” in the context of election transparency laws. Third, it surveys recent efforts to diminish election spending transparency by distorting the NAACP exemption through litigation, policy reforms, and in public discourse. Finally, it explains how the current legal landscape already enables extensive evasion of existing campaign finance disclosure laws and it is thus more important now than ever to prevent efforts to misappropriate the NAACP exemption and transform it into a loophole that undermines citizens' rights to make informed electoral choices.

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5. *Id.* at 366–69, 371.

I. TRANSPARENCY REQUIREMENTS ADVANCE FIRST AMENDMENT INTERESTS AND ARE A CRUCIAL TOOL FOR PREVENTING SECRET ELECTION SPENDING FROM UNDERMINING OUR DEMOCRACY

Informing citizens about the sources of money spent to influence elections is foundational to the American system of self-government.<sup>6</sup> As the Supreme Court explained in *Citizens United*, “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”<sup>7</sup> Citizens cannot fully and effectively participate in the political process unless they have access to information about who supports which positions and why. Access to that information is also necessary to hold elected officials accountable, and to ensure officeholders remain responsive to the public. These principles underlie the Supreme Court’s campaign finance disclosure decisions, which collectively embrace transparency about election-related spending as a constitutionally permissible and effective means of protecting citizens’ First Amendment rights to make “informed choices in the political marketplace.”<sup>8</sup>

A. *The Supreme Court Has Long Recognized the Democratic Value of Election-Spending Transparency*

The first federal campaign finance disclosure law was passed in 1910<sup>9</sup> and expanded in 1925.<sup>10</sup> The law was weak and widely circumvented, though it survived a lawsuit claiming that it infringed the power of the states.<sup>11</sup> Congress, the Supreme Court held, may “pass appropriate legislation to

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6. *Cf. Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (noting that free discussion of ideas and speech is crucial to self-government).

7. *Citizens United*, 558 U.S. at 339.

8. *See McConnell v. FEC*, 540 U.S. 93, 197 (2003), *partially abrogated by Citizens United v. FEC*, 558 U.S. 310, 363–65 (2010) (striking down the federal ban on corporate-funded independent expenditures and electioneering communications, which had been upheld in *McConnell*). Although *Citizens United* abrogated one part of the Court’s earlier decision in *McConnell*, most important for purposes of this article was the *Citizens United* Court’s reaffirmance, by an eight-Justice majority, of the constitutionality of the federal transparency requirements for such spending. *Citizens United*, 558 U.S. at 366–71.

9. Act of June 25, 1910, Pub. L. No. 61-274, ch. 392, 36 Stat. 822 (repealed 1971).

10. Federal Corrupt Practices Act, ch. 368, §§ 301–319, 43 Stat. 1070 (1925).

11. *See Burroughs v. United States*, 290 U.S. 534 (1934) (declaring it within Congress’s power to pass legislation designed to protect presidential elections from corruption and requiring the public disclosure of political contributions to further that goal); *see also Buckley v. Valeo*, 424 U.S. 1, 62 (1976) (*per curiam*).

safeguard [a Presidential] election from the improper use of money to influence the result.”<sup>12</sup>

Most of the statutory framework governing money in politics today was enacted as part of the Federal Election Campaign Act of 1971 (FECA), and its amendments in 1974.<sup>13</sup> FECA’s early provisions broadly regulated “all money spent ‘in connection with’ or ‘for the purpose of influencing’ federal elections.”<sup>14</sup> The statute included limitations on political contributions to federal candidates, public disclosure of contributions above a threshold, public funding for Presidential candidates, and the creation of a Federal Election Commission (FEC) to enforce the laws.<sup>15</sup>

When FECA was challenged in court, it resulted in a 1976 Supreme Court decision that continues to govern the constitutional parameters for how courts analyze a range of campaign finance requirements. In *Buckley v. Valeo*,<sup>16</sup> the Supreme Court generally upheld federal transparency rules for political contributions and expenditures, while striking down monetary limits on those expenditures.<sup>17</sup>

The Court acknowledged the First Amendment implications of FECA’s original disclosure requirements,<sup>18</sup> but explained that unlike

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12. *Burroughs*, 290 U.S. at 545.

13. Federal Election Campaign Act of 1971, Pub L. No. 92-225, 86 Stat. 3 (1972) (amended 1974).

14. Trevor Potter & Kirk L. Jowers, *The Frequently Mischaracterized Impact of the Courts on the FEC and Campaign Finance Law*, 51 CATH. U. L. REV. 839, 840 (2002).

15. See *Buckley*, 424 U.S. at 7 (summarizing FECA’s early provisions).

16. 424 U.S. 1 (1976) (per curiam).

17. *Id.* at 23, 29, 35, 39, 51.

18. FECA originally imposed expenditure limits and reporting requirements on independent expenditures “relative to a clearly identified candidate.” *Id.* at 39 (quoting 18 U.S.C. § 608(e)(1) (1970 ed., Supp. IV)). In reviewing the constitutionality of those provisions in *Buckley*, the Court adopted a narrowing construction of “expenditure” to avoid vagueness and overbreadth problems. *Id.* at 40–44, 80. Under *Buckley*, federal disclosure requirements for independent expenditures applied only to “expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” *Id.* at 44. Decades later, the Court clarified that its so-called “express advocacy” limitation was a “product of statutory interpretation”—to avoid constitutional problems of vagueness and overbreadth—“rather than a constitutional command.” *McConnell v. FEC*, 540 U.S. 93, 192 (2003), *partially abrogated by* *Citizens United v. FEC*, 558 U.S. 310 (2010). That clarification was key to the Court’s subsequent decisions upholding legislation that extended disclosure requirements to a broader range of communications, including commercial ads that merely mention a candidate and are broadcast shortly before an election. See *infra* Sections I.B.–C.

limits on contributions and expenditures, disclosure requirements “impose no ceiling on campaign-related activities.”<sup>19</sup> Disclosure laws are thus constitutionally permissible when there is a “substantial relation” between the information required to be disclosed and a “sufficiently important” government interest.<sup>20</sup> This intermediate standard of constitutional scrutiny—which is less demanding than the “strict scrutiny” standard that applies to political expenditure restrictions—is often called “exacting scrutiny.”<sup>21</sup> The *Buckley* Court identified three “sufficiently important” government interests that election-related disclosure laws advance: (1) allowing voters to better evaluate candidates for federal office; (2) deterring corruption and the appearance of corruption; and (3) detecting other campaign finance violations, such as circumvention of FECA’s contribution limits or its ban on foreign interference in American elections.<sup>22</sup>

In *Buckley*, the Court held that FECA’s disclosure requirements were substantially related to these important government interests and thus outweighed concerns about potentially infringing the exercise of First Amendment rights, “particularly when the ‘free functioning of our national institutions’ is involved.”<sup>23</sup>

Since *Buckley*, the Supreme Court has repeatedly reaffirmed the constitutional permissibility—and democratic value—of requiring transparency in the context of electoral advocacy. Just two years after *Buckley*, the Court upheld transparency requirements in the context of ballot initiative elections and recognized that identifying who is behind advertising for ballot measures enables “the people . . . to evaluate the arguments to which they are being subjected.”<sup>24</sup>

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19. *Buckley*, 424 U.S. at 64.

20. *Id.* at 64–66.

21. *See, e.g.*, *Doe v. Reed*, 561 U.S. 186, 196 (2010) (“We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed ‘exacting scrutiny[.]’” which “requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest”).

22. *Buckley*, 424 U.S. at 66–68.

23. *Id.* at 66 (quoting *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)).

24. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978).

*B. The Court in McConnell Recognized that Secret Election Spending Harms Citizens' First Amendment Rights*

A couple decades after *Buckley*, the Court revisited the constitutionality of political reporting and disclaimer requirements in the context of a challenge to the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>25</sup> BCRA, popularly known as the McCain-Feingold Act, was, in part, Congress's response to the growing problem of independent groups who run election-related advertisements "while hiding behind dubious and misleading names."<sup>26</sup> The Act extended FEC reporting requirements and "disclaimer" rules—disclaimers must provide information on the face of an ad about who paid for it and whether it is authorized by a candidate<sup>27</sup>—for pre-election ads that mention a candidate and are broadcast in the jurisdiction where that candidate is running for office.<sup>28</sup> BCRA's transparency provisions required organizations to reveal the sources of money used to pay for these "electioneering communication[s]"<sup>29</sup> so that the public could properly evaluate the election ads flooding the airways.

Senator Mitch McConnell and other plaintiffs claimed those requirements violated their First Amendment rights, but in *McConnell v. FEC*, eight Justices firmly disagreed.<sup>30</sup> As the Court recounted, the record in the case reflected that corporations and labor unions had been funding broadcast advertisements "designed to influence federal elections . . . while concealing their identities from the public."<sup>31</sup> Advertisements ran under misleading names like: "The Coalition-Americans Working for Real Change" (funded by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry), 'Republicans for Clean Air' (funded by brothers Charles and Sam Wyly)."<sup>32</sup>

"Given these tactics," the Court questioned "how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves

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25. Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 52 U.S.C. §§ 10101–30101 (2012)).

26. *McConnell v. FEC*, 540 U.S. 93, 197 (2003).

27. 52 U.S.C. § 30120(a), (c)–(d) (2012); 11 C.F.R. § 110.11 (2006).

28. 52 U.S.C. §§ 30104(f), 30120.

29. *Id.* § 30104(f).

30. *McConnell*, 540 U.S. at 120–21.

31. *Id.* at 196 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003) (three-judge court)).

32. *Id.* at 197 (quoting *McConnell*, 251 F. Supp. 2d at 237).

from the scrutiny of the voting public.”<sup>33</sup> BCRA’s transparency requirements are not only constitutionally *permissible*, the Court held, they affirmatively *promote* the “First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.”<sup>34</sup>

C. *Citizens United Confirms the First Amendment Value of Election-Spending Transparency Laws*

In 2010, the Supreme Court once again revisited the question of whether, and to what extent, election-spending transparency requirements are permissible under the First Amendment.<sup>35</sup> To be sure, *Citizens United* is best known for the part of the opinion in which five Justices held that corporations and unions have a First Amendment right to spend unlimited amounts of their general treasury funds to influence elections.<sup>36</sup> But Justice Kennedy’s majority opinion explicitly linked that controversial holding to another part of the opinion in which eight Justices reaffirmed the Court’s holding in *McConnell* that requiring transparency of the sources of paid political speech promotes First Amendment interests.<sup>37</sup>

*Citizens United* is a § 501(c)(4) nonprofit corporation that wanted to pay a cable company to distribute through video on demand a film about then Secretary of State and presidential candidate Hillary Clinton.<sup>38</sup> It also wanted to run on television a series of short advertisements promoting its film.<sup>39</sup> In claiming that BCRA’s reporting and on-ad disclaimer requirements violated the organization’s First Amendment rights, *Citizens United* urged the Supreme Court to broadly hold that BCRA’s disclosure requirements must be confined to ads that expressly advocate for or against candidates.<sup>40</sup> The group also suggested that its short promotional advertisements—some of which were just ten seconds long—should be exempt from disclosure

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33. *Id.* (quoting *McConnell*, 251 F. Supp. 2d at 237).

34. *Id.* (quoting *McConnell*, 251 F. Supp. 2d at 237).

35. *Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

36. *Id.* at 363–65.

37. *Id.* at 366–71.

38. See *Video on Demand (VoD)*, TECHOPEDIA (Apr. 26, 2013), <https://www.techopedia.com/definition/25650/video-on-demand-vod> [<https://perma.cc/V3P6-L9UP>] (defining Video on Demand as “a system that allows users to select and watch video content of their choice on their TVs or computers”).

39. *Citizens United*, 558 U.S. at 320.

40. *Id.* at 368–69.

requirements because they “only attempt[ed] to persuade viewers to see [its] film,” and should not be construed as electioneering.<sup>41</sup>

The Court rejected both arguments and reaffirmed its holding in *McConnell* that transparency laws advance First Amendment interests, including when applied to Citizens United’s short movie ads.<sup>42</sup> The Court explained that prompt disclosure of election spending provides citizens with information necessary to hold elected officials “accountable for their positions and supporters” and to “see whether elected officials are ‘in the pocket’ of so-called moneyed interests.”<sup>43</sup> The Court explained that the public’s “informational interest alone is sufficient to justify” application of BCRA’s transparency requirements “[e]ven if the ads only pertain to a commercial transaction” because transparency accords the electorate the opportunity to give proper weight to different speakers and messages.<sup>44</sup>

In the decade since it was decided, lower courts have applied *Citizens United* to uphold a wide range of state and federal political transparency laws.<sup>45</sup>

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41. *Id.* at 369.

42. *Id.* at 368–70.

43. *Id.* at 369.

44. *Id.* at 369.

45. *See, e.g.*, *Indep. Inst. v. Williams*, 812 F.3d 787, 799 (10th Cir. 2016); *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 313 (3d Cir. 2015); *Justice v. Hosemann*, 771 F.3d 285, 301 (5th Cir. 2014); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 145 (2d Cir. 2014); *Free Speech v. FEC*, 720 F.3d 788, 798 (10th Cir. 2013); *Worley v. Fla. Sec’y of State*, 717 F.3d 1238, 1255 (11th Cir. 2013); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 558 (4th Cir. 2012); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 499 (7th Cir. 2012); *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 72 (1st Cir. 2011); *Human Life of Wash. v. Brumsickle*, 624 F.3d 990, 1023 (9th Cir. 2010); *SpeechNOW.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc). *But see* *Ams. for Prosperity v. Grewal*, No. 3:19-cv-14228-BRM-LHG, 2019 WL 4855853, at \*20 (D.N.J. Oct. 2, 2019) (preliminarily enjoining New Jersey’s broad donor disclosure requirements for groups that spend money to influence elections or to simply provide political information on election issues); *Citizens Union of N.Y. v. Attorney Gen. of N.Y.*, 408 F. Supp. 3d 478, 508 (S.D.N.Y. 2019) (invalidating New York’s broad ethics reform legislation, which imposed public donor disclosure requirements on non-profit charities that donated to social welfare non-profits).

II. THE SUPREME COURT HAS RECOGNIZED A LIMITED, AS-APPLIED DISCLOSURE EXEMPTION FOR VULNERABLE GROUPS THAT REASONABLY FEAR SERIOUS THREATS AND HARASSMENT

In *Buckley*, *McConnell*, and *Citizens United*, the Supreme Court concluded that the government's interest in ensuring citizens are able to make informed electoral choices outweighed concerns about the alleged burdens that disclosure requirements would impose on the plaintiffs' political advocacy. While upholding the transparency requirements challenged in those cases, each opinion recognized that a future as-applied challenge to a disclosure law remains available to a group that "could show a 'reasonable probability' that disclosure of its contributors' names 'will subject them to threats, harassment, or reprisals from either Government officials or private parties.'"<sup>46</sup>

That standard originated in a pair of earlier cases involving constitutional challenges to laws in 1950s Alabama and Arkansas at a time of deep political unrest and violence. These challenges arose in the early days of the modern Civil Rights Movement against laws that required the NAACP to provide government officials with lists of NAACP members.<sup>47</sup> As described below, those cases were decided on a thorough record cataloguing serious threats, violence, and other harassment.<sup>48</sup>

A. *Origin of the "NAACP Exemption"*

In 1956, the Alabama Secretary of State required the NAACP to disclose the names and addresses of all of its members in the state, pursuant to Alabama's regulation of foreign corporations.<sup>49</sup> Fearing for the safety of its members, the NAACP refused and was held in contempt by Alabama state courts.<sup>50</sup> The organization petitioned for review in the United States

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46. See *Citizens United*, 558 U.S. at 367 (quoting *McConnell v. FEC*, 544 U.S. 93, 198 (2003)); *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam).

47. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 451, 462–63 (1958) (concluding that an Alabama mandate compelling the NAACP to disclose the identities of its members would likely entail "a substantial restraint upon the exercise by [NAACP] members of their right to freedom of association" in light of the organization's uncontroverted showing of economic reprisals, loss of employment, and threats of violence against NAACP members).

48. See *infra* Section II.A.

49. See *NAACP*, 357 U.S. at 452–53 (outlining the allegations in the suit the Attorney General brought to force the NAACP to disclose its members' information).

50. *Id.* at 451.

Supreme Court, asserting that Alabama's disclosure requirement violated its members' First Amendment rights of free association.<sup>51</sup>

The Supreme Court agreed with the NAACP: black civil rights activists in the southern states faced such severe threats that a requirement to publicly identify their names and addresses would likely deter them from remaining or becoming members of the organization.<sup>52</sup> The record included threats directed at schools where African-American students were attempting to enroll; bombings and shootings directed against buses, homes of African-American leaders and ministers, black taxi stands, and black churches; and Ku Klux Klan demonstrations and cross burnings.<sup>53</sup>

The Court concluded that Alabama's disclosure mandate, in light of the record presented by the NAACP, posed "the likelihood of a substantial restraint upon the exercise by [its] members of their right to freedom of association" by inducing some members to withdraw from the organization and dissuading others from joining because of

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51. *See id.* at 451, 453–54 (setting forth the NAACP's constitutional arguments in defense of nondisclosure).

52. *Id.* at 462–63; *see also* Dale E. Ho, NAACP v. Alabama *and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 409–11 (2012) (describing the factual context in which the NAACP v. Alabama case arose).

53. Although the Supreme Court's opinion omits the details, the brief for the NAACP cites numerous specific examples, including the following:

- a year-long series of bombings and shootings of African-American leaders in the bus segregation issue;
- nine bombings and ten shootings directed against buses or the homes of African-American leaders;
- the bombing of the home of Rev. F.L. Shuttlesworth, an African-American leader of the bus boycott;
- the bombing of four Black churches, homes of two ministers who were both leaders in the bus boycott, and a Black taxi stand, as well as the attempted bombing of the home of Rev. M.L. King; and
- false bombing reports at Phillips High School and student demonstrations at Woodland High School following reports that African-American students would attempt to enroll at these schools.

Brief for Petitioner, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (No. 91), 1957 WL 55387, at \*16 n.12. Dale Ho, former Assistant Counsel of the NAACP Legal Defense Fund and current Director of the American Civil Liberties Union's (ACLU) Voting Rights Project, observed that, "[a]lthough the Court did not discuss the larger social context in its decision, it seems implausible that the violent reprisals that faced civil rights activists at the time were not in the minds of the Justices when this case was decided." Ho, *supra* note 52, at 414–15.

fear of the consequences of being publicly associated with it.<sup>54</sup> It further found that Alabama's purpose—"to determine whether [the NAACP] was conducting intrastate business in violation of the Alabama foreign corporation registration statute"—was not "sufficient to overcome [the NAACP's] constitutional objections."<sup>55</sup>

The Supreme Court considered a similar case two years later. In *Bates v. City of Little Rock*,<sup>56</sup> the cities of Little Rock and North Little Rock, Arkansas mandated disclosure of the local NAACP's membership list as part of their new tax laws.<sup>57</sup> The NAACP again refused and challenged the requirements in court, invoking evidence of harassment, threats of violence, and economic reprisals against NAACP members, and arguing that public disclosure of membership would interfere with the freedom of association of NAACP members.<sup>58</sup> As it had found with respect to Alabama's requirements, the Court concluded that "the threat of substantial government encroachment upon important and traditional aspects of individual freedom [wa]s neither speculative nor remote."<sup>59</sup> It also found "no relevant correlation" between the municipalities' taxing power and the ordinances requiring local NAACP branches to disclose and publish their membership lists.<sup>60</sup>

In both cases, the Supreme Court engaged in a two-part analysis. First, the Court found that disclosure of NAACP member information would likely lead to the same kinds of actual and threatened violence and serious harassment that had already been well documented.<sup>61</sup> Second, the Court found that the government interests underlying the Alabama and Little Rock disclosure requirements were insufficiently important to overcome the harm that the requirements would likely cause to the First Amendment associational rights of the NAACP and its members.<sup>62</sup> As described below, courts have rarely reached similar conclusions in the electoral context, where transparency requirements serve important government interests and where, for the most part, the anticipated harm from disclosure is nowhere near as extensive or severe.

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54. *NAACP*, 357 U.S. at 462–63.

55. *Id.* at 464–65.

56. 361 U.S. 516 (1960).

57. *Id.* at 517.

58. *Id.* at 524.

59. *Id.*

60. *Id.* at 525.

61. *See id.* at 523–24; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462–63 (1958).

62. *See Bates*, 361 U.S. at 525–27; *NAACP*, 357 U.S. at 465–66.

*B. The NAACP Exemption in the Context of Electoral Transparency Laws*

The Supreme Court first considered how the *NAACP* exemption applies to election-related disclosure requirements in *Buckley*. The Court acknowledged that “public disclosure of contributions to candidates and political parties will deter some individuals who might otherwise contribute” and “[i]n some instances, disclosure may even expose contributors to harassment or retaliation,” but it observed that in the distinct context of campaign finance transparency, “disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.”<sup>63</sup> The Court further recognized that “there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the ‘free functioning of national institutions’ is involved.”<sup>64</sup>

Given the importance of an informed electorate, as well as the anticorruption and law enforcement interests served by campaign finance transparency requirements, the Court refused to grant a blanket disclosure exemption for minor political parties.<sup>65</sup> Instead, it recognized the availability of as-applied relief where “the type of chill and harassment identified in *NAACP v. Alabama* can be shown.”<sup>66</sup> The Court clarified that a party “need show only a reasonable probability that compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals,” and explained that relevant proof “may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself.”<sup>67</sup>

A few years later, the Court revisited the applicability of the *NAACP* exemption in the electoral context when the Socialist Workers Party (SWP) challenged the State of Ohio’s campaign finance disclosure requirements. Ohio’s laws would have required SWP, as a political party, to disclose the names and addresses of campaign contributors

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63. *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (per curiam).

64. *Id.* at 66.

65. *Id.* at 74.

66. *Id.*

67. *Id.*; see *McConnell v. FEC*, 540 U.S. 93, 198 (2003) (“In *Buckley*, unlike *NAACP*, we found no evidence that any party had been exposed to economic reprisals or physical threats as a result of the compelled disclosures. We acknowledged that such a case might arise in the future, however, and addressed the standard of proof that would then apply.” (citation omitted)).

and recipients of campaign disbursements.<sup>68</sup> The record included examples of “threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members’ property, police harassment of a party candidate, and the firing of shots at an SWP office.”<sup>69</sup> In addition, the Court cited “evidence that in the 12-month period before trial 22 SWP members, including 4 in Ohio, were fired because of their party membership,”<sup>70</sup> while private hostility made it hard for members to find employment.<sup>71</sup> The record also showed that the FBI had been surveilling and disrupting SWP operations for years, including during the commencement of the lawsuit.<sup>72</sup>

The Supreme Court invoked *Buckley*’s analysis of *NAACP* and considered both the probability of harm to SWP members and the importance of the state’s interest in disclosure. It found “substantial evidence of both governmental and private hostility toward and harassment of SWP members and supporters.”<sup>73</sup> It also found that as a “small” political party with only about sixty members in Ohio and “little success at the polls,”<sup>74</sup> SWP was unlikely to play a major role in politics or policy, rendering the state’s interest in disclosure relatively low.<sup>75</sup> The Court thus concluded that the balance tipped in favor of exempting SWP from Ohio’s disclosure requirements.<sup>76</sup>

After *Brown*, the SWP sought and obtained an extension of its campaign finance reporting exemption through the Federal Election Commission’s advisory opinion process. A series of five successive advisory opinions effectively extended the reporting exemption that SWP had obtained through the *Brown* litigation for more than 30 years, through December 31, 2016.<sup>77</sup> But when SWP sought a new advisory

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68. *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87 (1982).

69. *Id.* at 99.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 91.

74. *Id.* at 88.

75. *Id.* at 95.

76. *Id.* at 102.

77. FEC, ADVISORY OPINION 2012-38 (Apr. 25, 2013), <https://www.fec.gov/files/legal/aos/2012-38/AO-2012-38.pdf> [<https://perma.cc/8RCB-JKQZ>]; FEC, ADVISORY OPINION 2009-01 (Mar. 20, 2009), <https://www.fec.gov/files/legal/aos/2009-01/AO-2009-01-final.pdf> [<https://perma.cc/4AHA-Z834>]; FEC, ADVISORY OPINION 2003-02 (Apr. 4, 2003), <https://www.fec.gov/files/legal/aos/2003-02/2003-02.pdf> [<https://perma.cc/YEC4-AB59>]; FEC, ADVISORY OPINION 1996-46 (Mar. 11, 1997), <https://www.fec.gov/files/legal/aos/1996-46/1996-46.pdf> [<https://perma.cc/FJ4E-72LY>];

opinion further extending the exemption beyond 2016, FEC Commissioners in a divided vote declined to approve the request.<sup>78</sup> SWP's exemption thus expired at the end of that year. Commissioners who voted against extending SWP's disclosure exemption noted the party's increased electoral and fundraising success, found that the evidence submitted by SWP "demonstrates that harassment of the SWP's supporters has steadily decreased over the years since its disclosure exemption was first granted," and concluded that this recent evidence "does not indicate a reasonable probability that serious harassment and reprisals are likely to be inflicted on SWP supporters."<sup>79</sup> The FEC has not issued any other advisory opinions exempting a group from federal campaign finance transparency requirements.<sup>80</sup>

Nor has the Supreme Court, since *Brown*, found sufficient evidence of probable threats or harassment to overcome the government's substantial interests in transparent elections.<sup>81</sup> In *McConnell*, the Court distinguished the record before the Court from the record in *Brown*, agreeing with the district court that while some parties had expressed harassment concerns, there was a "lack of specific evidence about the basis for these concerns."<sup>82</sup> In *Citizens United*, the Court similarly referenced "recent events in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation."<sup>83</sup> The Court expressed "concern" about these examples, but nevertheless rejected *Citizens United*'s challenge to BCRA's transparency requirements, citing a lack of any evidence that *Citizens United* or its

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FEC, ADVISORY OPINION 1990-13 (Aug. 21, 1990), <https://www.fec.gov/files/legal/aos/1990-13/1990-13.pdf> [<https://perma.cc/AW64-58WE>].

78. FEC, ADVISORY OPINION REQUEST 2016-23 (Apr. 20, 2017), <https://www.fec.gov/files/legal/aos/2016-23/2016-23.pdf> [<https://perma.cc/PV42-YU2T>].

79. FEC, ADVISORY OPINION 2016-23 (SOCIALIST WORKERS PARTY) DRAFT B (Mar. 8, 2017), [https://www.fec.gov/files/legal/aos/2016-23/201623\\_1.pdf](https://www.fec.gov/files/legal/aos/2016-23/201623_1.pdf) [<https://perma.cc/GEM3-WJBZ>]; see FEC, VOTE CERTIFICATION (Apr. 20, 2017), [https://www.fec.gov/files/legal/aos/2016-23/201623V\\_1.pdf](https://www.fec.gov/files/legal/aos/2016-23/201623V_1.pdf) [<https://perma.cc/P6XB-VEQY>] (reflecting vote of two Commissioners in support of Draft B).

80. In one other instance, in 2013, the Commission, through another divided vote, declined to grant a request by the Tea Party Leadership Fund. FEC, ADVISORY OPINION REQUEST 2013-17 (Nov. 21, 2013), <https://www.fec.gov/files/legal/aos/2013-17/AO-2013-17.pdf> [<https://perma.cc/UK3E-YGQ8>].

81. As described *infra* Section II.C, lower courts have followed the Supreme Court's guidance and construed the NAACP exemption narrowly.

82. *McConnell v. FEC*, 540 U.S. 93, 199 (2003) (citing *McConnell v. FEC*, 251 F. Supp. 2d 176, 247 (D.D.C. 2003) (three-judge court)).

83. *Citizens United*, 558 U.S. at 370.

members were likely to face similar threats and observing, “[t]o the contrary, Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation.”<sup>84</sup>

Six months after deciding *Citizens United*, the Supreme Court issued another opinion reaffirming the constitutionality of transparency requirements “in the electoral context.”<sup>85</sup> In *Doe v. Reed*,<sup>86</sup> the Court considered a First Amendment challenge to a Washington State public records law that required public disclosure of the names and addresses of individuals who signed referendum petitions.<sup>87</sup> The particular referendum at issue concerned whether to extend certain benefits to same-sex couples, but the Court approached the case more broadly and focused “not [on] whether disclosure of this particular petition would violate the First Amendment, but whether disclosure of referendum petitions in general would do so.”<sup>88</sup> In a frequently cited concurrence, Justice Scalia noted the plaintiffs’ concerns that “disclosure of petition signatures may lead to threats and intimidation,” and suggested that while the State of Washington *could* keep petition signatures secret to avoid such consequences, it was not constitutionally required to do so, “[a]nd it may even be a bad idea.”<sup>89</sup> He opined, “[t]here are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”<sup>90</sup> Justice Scalia was concerned by the prospect of anonymous political campaigning and exercises of direct democracy through ballot initiatives and referendums “hidden from public scrutiny and protected from the accountability of criticism.”<sup>91</sup> “This,” Scalia said, “does not resemble the Home of the Brave.”<sup>92</sup>

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84. *Id.*

85. *Doe v. Reed*, 561 U.S. 186, 196 (2010).

86. 561 U.S. 186 (2010).

87. *Id.* at 191.

88. *Id.*

89. *Id.* at 219, 228 (Scalia, J., concurring).

90. *Id.* at 228.

91. *Id.*

92. *Id.* In expressing these concerns, Justice Scalia invoked the Court’s earlier decision in *McIntyre v. Ohio Elections Commission*, from which he dissented. 514 U.S. 334, 371–85 (1995) (Scalia, J., dissenting). In *McIntyre*, the Court held that an Ohio disclosure statute could not constitutionally be applied to an individual’s in-person distribution of homemade handbills advocating her views regarding an imminent

*Reed*, and the Supreme Court's campaign finance disclosure decisions that preceded it, make clear that an entity is not entitled to the NAACP exemption in the context of electoral transparency laws merely because of general claims of threats or harassment. These cases reflect the Court's recognition of the crucial role electoral transparency laws play in our democracy and the high bar that a party must meet when it is seeking to deprive voters of important information that may affect their electoral choices.

C. *Lower Court Decisions Underscore the Narrow Scope of the NAACP Exemption in the Campaign Finance Context*

Lower courts have followed the Supreme Court's lead and construed the NAACP exemption narrowly when it has been invoked to try to avoid electoral transparency requirements. To be sure, not every claim for the exemption has been rejected, but other successful claimants have had similar public profiles to either the NAACP or Socialist Workers Party. In a couple of cases in the early 1980s, lower courts granted disclosure exemptions to the Communist Party and an Illinois branch of the Socialist Workers Party.<sup>93</sup> In one case decided while the *Brown* litigation was pending, an Illinois district court exempted the

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referendum on a proposed school tax levy. *Id.* at 337, 357. The decision emphasized the in-person nature of Mrs. McIntyre's distribution of her handbills and the "personally crafted" nature of such election materials and distinguished these circumstances from *Buckley*. *Id.* at 337, 353–56. *McIntyre* is an outlier, and the Supreme Court has never relied on it as authority in subsequent decisions addressing campaign finance disclosure requirements; lower court campaign finance decisions also frequently distinguish it. *See, e.g.,* Yamada v. Snipes, 786 F.3d 1182, 1203 n.14 (9th Cir. 2015); Worley v. Fla. Sec'y of State, 717 F.3d 1238, 1247 (11th Cir. 2013); Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 482 (7th Cir. 2012).

Justice Scalia's dissent in *McIntyre* emphasizes the limited scope of the NAACP exemption. To the question "whether a 'right to anonymity' is such a prominent value in our constitutional system that even protection of the electoral process cannot be purchased at its expense," he concluded "[t]he answer . . . is clear: no." *McIntyre*, 514 U.S. at 379. While cases, such as *Brown*, *Bates*, and *NAACP*, held that the disclosure of a person's identity in "peculiar circumstances" would "unconstitutionally deter the exercise of the First Amendment," those cases did not establish a right to anonymity or the right of all citizens to ignore the laws under challenge. *Id.*

93. *FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 423 (2d Cir. 1982) (exempting the Communist Party from federal campaign finance disclosure requirements); 1980 Ill. Socialist Workers Campaign v. Ill. Bd. of Elections, 531 F. Supp. 915, 921–22 (N.D. Ill. 1981) (exempting a local branch of SWP—the same Socialist Party group that obtained a disclosure exemption in the *Socialist Workers* case—from Illinois disclosure laws).

local branch of the Socialist Workers Party after its Chicago office was firebombed and burglarized and the group had been surveilled by the Chicago Police Department.<sup>94</sup> In the other case, the Second Circuit exempted the Communist Party from federal campaign finance disclosure requirements, finding that it met *Buckley*'s high bar because it was a “disfavored minority part[y]” or “fringe organization[ ]” whose very existence would be threatened by disclosure.<sup>95</sup> Indeed, the Second Circuit cited various state and federal laws, still on the books, that subjected members of the Communist Party to civil and criminal liability, and concluded that the fear of serious reprisals was sufficiently grave to warrant the exemption.<sup>96</sup>

Although these decisions granted disclosure exemptions to marginalized and targeted fringe political party organizations, lower courts have generally refrained from extending the exemption to other groups. In particular, lower courts have rejected claims by large, well-funded groups who would prefer to keep their donors anonymous or who claim that disclosure would expose them to protests and other harassment that does not nearly approach the scope or severity documented in cases like *NAACP* and *Brown*.

In *ProtectMarriage.com v. Bowen*,<sup>97</sup> for example, two political committees supporting California's Proposition 8—which proposed an amendment to the California constitution defining marriage as only between a man and a woman<sup>98</sup>—sought an exemption from the state's campaign finance transparency laws. The plaintiffs alleged harassment against supporters of Proposition 8, including vandalism of political signs, angry protests, unsolicited phone calls, death threats, and various forms of economic reprisal.<sup>99</sup>

Applying *Buckley*, the Eastern District of California found that the plaintiffs' claims did not warrant an exemption from the state's disclosure requirements.<sup>100</sup> The court invoked the Supreme Court's determination that “disclosure exemptions were primarily intended to

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94. *1980 Ill. Socialist Workers Campaign*, 531 F. Supp. at 921.

95. *Hall-Tyner Election Campaign Comm.*, 678 F.2d at 419–20.

96. *Id.* at 422–23.

97. 830 F. Supp. 2d 914 (E.D. Cal. 2011), *aff'd in part, dismissed in part sub nom.* *ProtectMarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827 (9th Cir. 2014).

98. *Id.* at 916.

99. *See id.* at 917–22 (summarizing in detail plaintiffs' evidence of threats, harassment, and reprisals).

100. *Id.* at 952.

combat harms suffered by small, persecuted groups.”<sup>101</sup> It also found that plaintiffs were far from a fringe organization, having convinced over seven million voters to support Proposition 8 (52.3% of the vote), raised almost \$30 million, and organized a “massive movement” to successfully “legislate a concept steeped in tradition and history.”<sup>102</sup>

The California district court also distinguished the plaintiffs’ evidence of threats, harassment, and reprisals from the “proportionality and magnitude” demonstrated in *Brown* and *NAACP*.<sup>103</sup> Plaintiffs offered relatively few instances of serious harassment as compared to the many millions who supported their cause.<sup>104</sup> The court found that the seriousness of the risk to plaintiffs paled in comparison to the systemic private and governmental reprisals faced by socialist and communist groups or the NAACP.<sup>105</sup> It explained that supporters of a “movement to recognize marriage in California as existing only between a man and a woman” were not similarly situated to the SWP or NAACP plaintiffs in *Brown* and *NAACP*; “Proposition 8 supporters promoted a concept entirely devoid of governmental hostility.”<sup>106</sup> The court was thus, “at a loss to find any principled analogy between two such greatly diverging sets of circumstances.”<sup>107</sup>

Another critical distinction in the *ProtectMarriage.com* litigation was the fact that much of the plaintiffs’ evidence of “harassment” involved boycotts and angry protests, displays of dissatisfaction with plaintiffs’ cause that were themselves “forms of speech protected by [the First Amendment].”<sup>108</sup> As the court explained at an earlier stage of the litigation, a decision not to patronize a particular establishment or business, or to withhold economic resources is “an inherent right of the American people” and “individuals have repeatedly resorted to boycotts as a form of civil protest intended to convey a powerful message.”<sup>109</sup> This form of counter speech remains protected, the Supreme Court has explained, even where “it may embarrass others or

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101. *Id.* at 931.

102. *Id.* at 929.

103. *Id.* at 932–33.

104. *Id.* at 933 (“Plaintiffs . . . would need evidence of thousands of acts of reprisals, threats or harassment, spanning much more than the short period of time covering California’s ballot-initiative process to prove contributors to such a massive group are entitled to anonymity of the type justified years ago for the individuals in *Brown* and *NAACP*.”).

105. *Id.*

106. *Id.* at 931–32.

107. *Id.* at 932.

108. *Id.* at 934.

109. *Id.*

coerce them into action.”<sup>110</sup> Ultimately, the California district court concluded that Proposition 8 advocacy organizations did not qualify for a disclosure exemption.<sup>111</sup>

A federal district court in Washington reached the same conclusion in an analogous context in *Doe v. Reed*. As described in Section II.B, at an earlier stage in the *Reed* litigation, the Supreme Court issued a broad holding that requiring disclosure of individuals who sign referendum petitions in general is permissible under the First Amendment.<sup>112</sup> When the district court subsequently reached the merits of whether mandatory disclosure of signatories to a state referendum to deny benefits to same-sex couples violated the First Amendment, the court found that Washington’s public records law was constitutional.<sup>113</sup>

As in *ProtectMarriage.com*, the Washington district court first determined that the plaintiffs—signors of a referendum petition to reject a bill granting new rights to same-sex partners—were not similarly situated to the “minor part[ies]” and “fringe organization[s]” that obtained exemptions in *NAACP*, *Brown*, and the related cases concerning the same or similarly situated parties.<sup>114</sup> Next, the court considered the sufficiency of the plaintiffs’ evidence of threats, harassment, or reprisals, which included isolated accounts of angry speech, offensive gestures and insults, and threatening phone calls, among others.<sup>115</sup> The court found that plaintiffs’ evidence did not rise to the “level or amount” presented in *Brown* and *NAACP*.<sup>116</sup>

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110. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982); *see also, e.g.*, Elian Dashev, Note, *Economic Boycotts as Harassment: The Threat to First Amendment Protected Speech in the Aftermath of Doe v. Reed*, 45 LOY. L.A. L. REV. 207, 207 (2011) (arguing that courts should not allow “Major Political Players” to use economic boycotts as a justification for a disclosure exemption in as-applied challenges); Michael C. Harper, *The Consumer’s Emerging Right to Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law*, 93 YALE L.J. 409, 409–10 (1984) (stating that a consumer right to boycott is appropriate for society and should be regarded as a “broad political right”).

111. *ProtectMarriage.com*, 830 F. Supp. 2d. at 924–25, 936.

112. *Doe v. Reed*, 561 U.S. 186, 196 (2010).

113. *Doe v. Reed*, 823 F. Supp. 2d 1195, 1212–13 (W.D. Wash. 2011).

114. *Id.* at 1203–04.

115. *Id.* at 1205–10 (summarizing in detail plaintiffs’ evidence of threats, harassment, and reprisals).

116. *Id.* at 1210, 1212 (“This is a quite different situation than the progeny of cases providing an as-applied exemption wherein the government was actually involved in carrying out the harassment, which was historic, pervasive, and documented.”).

These cases, among others,<sup>117</sup> highlight three defining features of the disclosure exemption doctrine in the electoral context.

*First, as-applied means as-applied.* NAACP does not provide justification for invalidating generally applicable campaign finance transparency regimes in their entirety, nor does it support new blanket exemptions from campaign finance disclosure laws.<sup>118</sup> A court's determination of whether an exemption from campaign finance transparency requirements is warranted is highly fact dependent.<sup>119</sup>

*Second, the analysis should consider whether the party seeking a disclosure exemption is a "small, persecuted group whose very existence depend[s] on some manner of anonymity,"* i.e., whether it is similarly situated to the NAACP in the 1950s or the Socialist Workers and Communist parties in the 1970s and 80s.<sup>120</sup>

*Third, while the allegedly feared threats, harassment, or reprisals need only be reasonably probable, the nature of probable harm must be serious.* The records in NAACP and *Brown*, for example, included evidence of systematic violence and repression faced by the NAACP and Socialist Workers Party for years.<sup>121</sup> Particularly in the electoral context, where

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117. *E.g.*, *Family PAC v. McKenna*, 685 F.3d 800, 807–08 (9th Cir. 2012) (suggesting that the exemption will only apply in the "atypical" or "unusual" case); *Jones v. Unknown Agents of the FEC*, 613 F.2d 864, 875 (D.C. Cir. 1979) (describing the circumstances meriting a grant of an NAACP exemption to be "limited").

118. *See Doe v. Reed*, 561 U.S. 186, 201–02 (2010) (rejecting plaintiffs' claim for a blanket exemption from the Washington Public Records Act for signors of referendum petitions); *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam).

119. *See ProtectMarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 840 (9th Cir. 2014) ("As-applied challenges to contribution disclosure laws are fact-specific in nature."); *Averill v. City of Seattle*, 325 F. Supp. 2d 1173, 1174 n.1 (W.D. Wash. 2004) ("[T]he exemption analysis is fact specific and depends on, among other things, the surrounding political climate and recent indications of hostility . . ."); *see also Doe v. Reed*, 697 F.3d 1235, 1248–49 (9th Cir. 2012) (finding a "stark contrast" between plaintiffs' evidence and the evidence presented in *Brown*); *Master Printers of America v. Donovan*, 751 F.2d 700, 704–05 (4th Cir. 1984) (denying a labor organization an exemption from the reporting requirements of the Labor-Management Reporting and Disclosure Act (LMRDA) because the record did not establish the kind of "deterrent effect" required under *Buckley* and NAACP).

120. *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 928 (E.D. Cal. 2011). *See FEC v. Hall-Tyler Election Campaign Comm.*, 678 F.2d 416, 419–20 (2d Cir. 1982); *Doe v. Reed*, 823 F. Supp. 2d 1195, 1203–04 (W.D. Wash. 2011); *see also Dale Ho*, *supra* note 52, at 435 ("[C]ontext matters: the *identity* of the party subject to disclosure and its relative position in society are relevant factors.").

121. *See Family PAC*, 685 F.3d at 807–08 (requiring a showing of a "genuine" or "bona fide" threat of harassment or retaliation); *Doe*, 697 F.3d at 1248–49 (requiring plaintiff to show "the kind of focused and insistent harassment . . . required in *Buckley*").

an exemption may result in voters being deprived of information relevant to their electoral decisions, the scope and severity of likely threats and harassment must be weighty and go beyond boycotts and protests that are themselves forms of speech protected by the First Amendment.<sup>122</sup> It is against this legal backdrop that anti-transparency groups are trying to pry open and magnify this limited exemption.

### III. RECENT EFFORTS TO DISTORT THE NARROW *NAACP* EXEMPTION INTO A NEW GENERAL RIGHT TO PRIVACY

Despite courts' overwhelming recognition of the importance of ensuring voters have access to information about who is spending money to influence our elections, efforts to conceal political spending—especially the spending through corporations that was unleashed by *Citizens United*—are on the rise. In particular, powerful, well-funded groups are actively seeking to change the law through litigation, policy, and media campaigns that misappropriate the concepts of “threats and harassment” from *NAACP* into generalized arguments in favor of secret political spending.

#### A. *Recent Lawsuits Seek Broad Decisions Invalidating Disclosure Laws by Misconstruing NAACP*

In recent years, anti-disclosure groups have filed lawsuits in which they tried—and, in most cases, failed—to recast *NAACP* as support for claims that disclosure requirements are themselves a First Amendment injury. These lawsuits mischaracterize *NAACP* as embracing a broad constitutional right to donor privacy and largely disregard the factual context that was central to the decision. Fortunately, courts have generally rejected these arguments.

In 2014, the Center for Competitive Politics (CCP)—a § 501(c)(3) nonprofit organization that has since renamed itself the “Institute for Free Speech”<sup>123</sup>—brought a facial challenge to a California rule requiring California-registered charities to disclose to state regulators the identities of their major donors as reported on a federal tax form (Form 990 Schedule B) filed by the charities with the Internal Revenue Service (IRS).<sup>124</sup> Neither the federal requirement nor the state rule requires the charitable donor information to be disclosed to the public.<sup>125</sup> CCP invoked *NAACP* and *Buckley*

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122. See *ProtectMarriage.com*, 830 F. Supp. 2d. at 934, 952.

123. IFS Staff, *Center for Competitive Politics Renamed Institute for Free Speech*, INST. FOR FREE SPEECH (Oct. 25, 2017), <http://www.ifs.org/news/center-for-competitive-politics-renamed-institute-for-free-speech> [<https://perma.cc/8N7P-4V7P>].

124. *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1309–10 (9th Cir. 2015).

125. See *id.*

as purported support for its “novel theory” that the confidential donor disclosure requirement was “in and of itself” an injury to CCP’s First Amendment right of association because it would chill its donors’ participation.<sup>126</sup> CCP argued that the court should weigh that inherent injury when analyzing the constitutionality of the reporting requirement.<sup>127</sup>

The Ninth Circuit rejected CCP’s argument.<sup>128</sup> The court acknowledged that disclosure requirements have an inherent *potential* to substantially infringe on the exercise of First Amendment rights in limited circumstances.<sup>129</sup> But that general inherent risk is not sufficient to warrant an exemption; rather, the plaintiff must demonstrate an “actual burden” on its right of association, and CCP made no such showing.<sup>130</sup> The court also rejected CCP’s extensive reliance on *NAACP* and its progeny, explaining that those “as-applied” cases were irrelevant to CCP’s facial challenge.<sup>131</sup>

One year later, another group brought a similar constitutional challenge to California’s Schedule B requirement, although this lawsuit sought an as-applied exemption rather than facial invalidation of the law.<sup>132</sup> The plaintiff seeking as-applied relief was Americans for Prosperity Foundation (AFP Foundation), a § 501(c)(3) nonprofit connected to billionaire brothers David and Charles Koch.<sup>133</sup> Notably, AFP Foundation is related to Americans for Prosperity (AFP), a § 501(c)(4) political advocacy organization whose resources are so substantial, and whose political spending is so massive and widespread, some have suggested it “may be America’s third-biggest political party.”<sup>134</sup>

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126. *Id.* at 1312–13.

127. *Id.* at 1313–14.

128. *See id.* at 1316 (“[N]o case has ever held or implied that a disclosure requirement in and of itself constitutes First Amendment injury.”).

129. *Id.* at 1313.

130. *Id.* at 1314, 1316 (explaining that CCP failed to allege that the non-public disclosures would result in any reprisals by a governmental entity and that its assertions of inadvertent public disclosure were too speculative).

131. *Id.* at 1312 n.3.

132. *See Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1006 (9th Cir. 2018) (noting that when the Ninth Circuit ruled against a facial constitutional challenge to the Schedule B requirement, it “left open the possibility . . . that a future litigant might . . . warrant relief on an as-applied challenge” (citing *Ctr. for Competitive Politics*, 784 F.3d at 1317)); Petition for Writ of Certiorari at 29–32, *Thomas More Law Ctr. v. Becerra*, 2019 WL 4034756 (Aug. 26, 2019) (No. 19-255).

133. *Ams. for Prosperity Found.*, 903 F.3d at 1004, 1013.

134. *See Philip Bump, Americans for Prosperity May Be America’s Third Biggest Political Party*, WASH. POST (June 19, 2014, 2:32 PM), <https://www.washingtonpost.com/news/the-fix/wp/2014/06/19/americans-for-prosperity-is-americas-third-biggest-political->

In its challenge to California's Schedule B requirement, AFP Foundation argued that the confidential disclosure rule would deter contributors by subjecting them to threats, harassment, and reprisals in the event that state regulators inadvertently leaked Schedule B to the public.<sup>135</sup> AFP presented evidence that some of its public supporters, including the Koch brothers, had endured boycotts, defamatory articles, personal threats, and other economic reprisals.<sup>136</sup> Ultimately, the Ninth Circuit concluded that the risk of inadvertent public disclosure was so slight that there was no reasonable probability that California's confidential disclosure requirement would lead to any such reprisals.<sup>137</sup>

The Second Circuit considered substantially identical claims challenging New York's Schedule B disclosure requirements, and it reached the same conclusion as the Ninth Circuit.<sup>138</sup> The plaintiff, Citizens United, argued that New York's confidential disclosure law, by itself, substantially infringed its First Amendment associational rights.<sup>139</sup> The Second Circuit disagreed, recognizing that although any disclosure rule "comes with some risk of abuse," that "background risk" is not itself a constitutional problem, nor is disclosure "itself an evil."<sup>140</sup>

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party (discussing AFP's \$100 million spending on 2014 election races); *see also* Nicholas Confessore, *Koch Brothers' Budget of \$889 Million for 2016 Is on Par with Both Parties' Spending*, N.Y. TIMES (Jan. 26, 2015), <https://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to-spend-900-million-on-2016-campaign.html> (reporting that AFP's planned spending of almost \$900 million on the 2016 campaign was an "unparalleled effort by coordinated outside groups to shape a presidential election"); Jonathan Easley, *Koch Network Launching 4 PACs, Open to Backing Some Dems in 2020*, HILL (June 7, 2019, 9:11 AM), <https://thehill.com/homenews/campaign/447420-koch-network-launching-4-new-pacs-in-preparation-for-2020-primary> [<https://perma.cc/QH38-G754>] (explaining that AFP, a "sprawling network of libertarian-minded donors, philanthropists and activists[,] spent \$400 million on politics and policy during the 2018 election cycle"); Alexander Hertel-Fernandez et al., *How the Koch Brothers Built the Most Powerful Rightwing Group You've Never Heard of*, GUARDIAN (Sept. 26, 2018, 3:01 PM), <https://www.theguardian.com/us-news/2018/sep/26/koch-brothers-americans-for-prosperity-rightwing-political-group> [<https://perma.cc/VH6K-4U6B>] (highlighting AFP-Wisconsin's 125,000 grassroots activists, which equal "around 2% of the state's population"); Kenneth P. Vogel, *How the Koch Network Rivals the GOP*, POLITICO: THE KOCH MACHINE (Dec. 30, 2015, 5:17 AM), <http://bit.ly/31HIPbV> [<https://perma.cc/27SW-W9RW>] (describing AFP's internal workings, massive expenditures, and political clout).

135. *Ams. for Prosperity Found.*, 903 F.3d at 1013.

136. *Id.* at 1016–17.

137. *Id.* at 1017–19.

138. *See* *Citizens United v. Schneiderman*, 882 F.3d 374, 378 (2d Cir. 2018).

139. *Id.* at 383.

140. *Id.*

The court explained that “anonymity can protect both those whose unpopular beliefs might subject them to retaliation and those who seek to avoid detection (and consequences) for deceptive or harmful activities that governments have legitimate interests in preventing.”<sup>141</sup>

The Second Circuit rejected Citizens United’s attempt to use *NAACP* as a broad sword to strike down transparency laws on their face. Citing *Buckley* and *Citizens United*, the court noted that *NAACP* only offers a “shield of privacy” when disclosure results in *actual* restraints on associational rights—as measured by a reasonable probability that disclosure will result in serious threats, harassment, or reprisals—and when those actual restraints outweigh the public’s interest in disclosure.<sup>142</sup>

Applying that standard, the Second Circuit also rejected Citizens United’s as-applied challenge, noting that the group’s evidence—“bare assertion[s]” of retaliatory targeting by the New York Attorney General—was a “far cry from the clear and present danger that white supremacist vigilantes and their abettors in the Alabama state government presented to members of the NAACP in the 1950s.”<sup>143</sup>

Of course, the confidential disclosure requirements challenged in these cases are not entirely parallel to the election transparency requirements addressed in *Buckley*, *Brown*, *Citizens United*, and the cases addressing same-sex marriage ballot measures. The likelihood of threats and retaliation is arguably lower in the context of Schedule B rules, which require charitable organizations to disclose their major donors to government regulators, *but not to the public*. Those rules also promote some government interests that are not implicated by election-spending transparency laws, like enabling the government to ensure that charities and other nonprofit groups are complying with the requirements that entitle them to their tax exemptions. At the same time, Schedule B reporting requirements and campaign finance disclosure requirements both help government officials identify fraud and other violations of law, including campaign finance law,<sup>144</sup> while campaign finance disclosure requirements also reduce corruption and inform voters about the sources of election spending.

Regardless of these distinctions, these and other broad legal challenges to confidential Schedule B reporting, if successful, threaten to undermine campaign finance transparency requirements. Indeed,

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141. *Id.*

142. *Id.*

143. *Id.* at 385.

144. *See infra* notes 154–55 and accompanying text.

one district court has already suggested, in dicta, that our current divisive political climate, “marked by the so-called cancel or call-out culture,” may make it easier for AFP to obtain a disclosure exemption today than in the past.<sup>145</sup> The mere suggestion that such an enormously powerful organization<sup>146</sup> could be eligible for an *NAACP* exemption marks a concerning departure from established precedents.

*B. Legislative and Regulatory Efforts to Eliminate Disclosure Requirements*

Efforts to eliminate or reduce the scope of political transparency laws are not limited to litigation. Legislatures and agencies are also pursuing policy changes that would override existing disclosure requirements, reducing transparency about groups engaged in political spending and undermining regulators’ ability to detect and respond to violations of law.

In the past few years, for example, virtually identical anti-transparency bills were introduced in Michigan and Mississippi.<sup>147</sup> The bills included language broadly restricting the ability of state and local agencies to require § 501(c) nonprofit organizations to disclose information about their members, donors, and supporters—including even when the disclosure filings would not be made available to the public.<sup>148</sup> Importantly, the mandatory concealment of nonprofits’ information was not limited to charities and religious organizations established under § 501(c)(3) of the Internal Revenue Code, but extended to § 501(c)(4) “social welfare” organizations, § 501(c)(5) labor unions, and § 501(c)(6) trade associations, all of which engage

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145. *Ams. for Prosperity v. Grewal*, No. 3:19-cv-14228-BRM-LHG, 2019 WL 4855853, at \*20 (D.N.J. Oct. 2, 2019). The court ultimately held that New Jersey’s broad transparency law, which imposed public donor disclosure requirements on groups that spend money to influence elections or to simply provide factual information on candidates and ballot issues, was likely unconstitutional on its face and thus avoided the question of whether AFP was entitled to an as-applied exemption. *Id.*

146. *See supra* note 134 and accompanying text.

147. An Act to Provide that a Public Agency Shall Not Require Any Entity Organized Under Section 501(c) of the Internal Revenue Code to Provide the Public Agency with Personal Information, H.B. No. 1205 (Miss. 2019), <http://billstatus.ls.tate.ms.us/documents/2019/pdf/HB/1200-1299/HB1205SG.pdf> [<https://perma.cc/5YG5-JU3V>]; Personal Privacy Protection Act, S. 1176, 99th Leg., Reg. Sess. (Mich. 2018), <http://www.legislature.mi.gov/documents/2017-2018/billenrolled/Senate/pdf/2018-SNB-1176.pdf> [<https://perma.cc/2RJE-386P>].

148. Miss. H.B. No. 1205; Mich. S. 1176, 99th Leg., Reg. Sess.

in extensive amounts of political campaigning and lobbying activity.<sup>149</sup> As one columnist in Mississippi observed, shielding these activities from disclosure helps “those who want to buy candidates and influence elections who do not want their identities known.”<sup>150</sup>

In December 2018, former Michigan Governor Rick Snyder vetoed the Michigan bill.<sup>151</sup> He characterized it as “a solution in search of a problem” and pointed out that the Supreme Court’s longstanding *NAACP* decision already provides as-applied protection to a group facing a genuine prospect of harm as a result of disclosure.<sup>152</sup> A few months later, on April 3, 2019, former Mississippi Governor Phil Bryant signed a nearly identical bill into law.<sup>153</sup>

The IRS is also considering policy changes that would dramatically narrow the scope of tax-exempt organizations that are subject to IRS reporting requirements. Under the long-standing existing rule, each nonprofit group organized under § 501(c) of the tax code must confidentially report to the IRS the identity of all contributors who donate \$5,000 or more per year to the organization.<sup>154</sup> The current rule—which created the federal Schedule B that California and New York require state charities to file with regulators in those states—serves the same interests of enabling the government to identify and address fraud and violations

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149. See *Dark Money Basics*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/dark-money/basics> [<https://perma.cc/A8KT-7A4N>] (*detailing the operation of political nonprofits and super PACs and their covert financial influences on elections*).

150. See Bill Crawford, *Bryant Should Veto Dark Money Bill*, MERIDIAN STAR (Mar. 24, 2019), [https://www.meridianstar.com/opinion/columns/bill-crawford-bryant-should-veto-dark-money-bill/article\\_47a1434e-a39b-50f9-a0bc-46059c3240bd.html](https://www.meridianstar.com/opinion/columns/bill-crawford-bryant-should-veto-dark-money-bill/article_47a1434e-a39b-50f9-a0bc-46059c3240bd.html) [<https://perma.cc/QKP6-AANU>].

151. Veto Statement for S. 1176, Gov. Rick Snyder (Dec. 28, 2018), S. Journal, 99th Leg., Reg. Sess., at 2637 (Mich. 2018), [http://www.legislature.mi.gov/\(S\(yvzvsl35tcqf0nvozbp4h2\)\)/documents/2017-2018/Journal/Senate/pdf/2018-SJ-12-31-085.pdf](http://www.legislature.mi.gov/(S(yvzvsl35tcqf0nvozbp4h2))/documents/2017-2018/Journal/Senate/pdf/2018-SJ-12-31-085.pdf) [<https://perma.cc/M4RZ-F46Y>]; see Jim Malewitz, *Snyder Vetoes Bills Criticized as ‘Power Grabs,’* REC. EAGLE (Jan. 4, 2019), [https://www.record-eagle.com/opinion/opinion-snyder-vetoes-bills-criticized-as-power-grabs/article\\_f6335061-4889-5c5f-ae09-fd8edae6ceb6.html](https://www.record-eagle.com/opinion/opinion-snyder-vetoes-bills-criticized-as-power-grabs/article_f6335061-4889-5c5f-ae09-fd8edae6ceb6.html) [<https://perma.cc/QH8P-YB38>] (noting that in 2019, Michigan saw an “unprecedented influx of cash from so-called dark money groups,” many of which were located out of state, in its elections).

152. Veto Statement for S. 1176, *supra* note 151.

153. See Miss. Code. Ann. § 25-62-3 (2019) (prohibiting public agencies from requiring disclosures from any 501(c) organization).

154. Returns and Annual Reports of Exempt Organizations, 36 Fed. Reg. 11,025, 11,027 (June 8, 1971) (codified at 26 C.F.R. pt. 1); see also 26 C.F.R. §§ 1.6001-1(c), 1.6033-2(a)(2)(iii)(a) (2019).

other laws that the Ninth and Second Circuits cited in upholding the California and New York requirements.<sup>155</sup>

A recently proposed rule would eliminate the federal Schedule B reporting requirement for all tax-exempt organizations except charities incorporated under § 501(c)(3) and § 527 political organizations.<sup>156</sup> As explained in comments submitted by the nonpartisan Campaign Legal Center, a group of sixteen United States Senators, and others,<sup>157</sup> the proposed rule would thus enable groups like § 501(c)(4) social welfare organizations and § 501(c)(6) trade associations—organizations that serve as vehicles for hundreds of millions of dollars of political spending<sup>158</sup>—to conceal the sources of

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155. See *supra* Section III.A; see also *Citizens United v. Schneiderman*, 882 F.3d 374, 382 (2d Cir. 2018) (“Collecting donor information on a regular basis from all organizations ‘facilitates investigative efficiency,’ and can help [regulators] to ‘obtain a complete picture of [the organizations’] operations’ and ‘flag suspicious activity’ simply by using information already available to the IRS.”).

156. Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 84 Fed. Reg. 47,447, 47,451 (proposed Sept. 9, 2019) (to be codified at 26 C.F.R. pt. 1).

157. See Campaign Legal Center, Comment Letter on Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations (Dec. 5, 2019), <https://www.regulations.gov/document?D=IRS-2019-0039-3096> [<https://perma.cc/VL6T-AFLU>] (explaining how the proposed repeal of the requirement that certain tax-exempt organizations identify significant donors will “effectively invite illegal foreign spending in U.S. elections, cripple future enforcement of campaign finance laws, and hamstring efficient tax administration”); U.S. Sen. Amy Klobuchar et al., Comment Letter on Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations (Dec. 9, 2019), <https://www.regulations.gov/document?D=IRS-2019-0039-8319> [<https://perma.cc/XG4T-3ML5>] (expressing “significant concern” that the proposed repeal of IRS nonprofit reporting requirement will “undermine[] our political system” and “make[] it easier for foreign adversaries to influence our elections”). One comment regarding the proposed rule, submitted by U.S. Senators Sheldon Whitehouse, Tom Udall, Richard Blumenthal, and Elizabeth Warren, describes the magnitude of this “explosion” of political spending by § 501(c)(4) organizations since the Supreme Court issued its *Citizens United* decision. U.S. Sen. Whitehouse et al., Comment Letter on Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations (Dec. 9, 2019), <https://www.regulations.gov/document?D=IRS-2019-0039-8363> [<https://perma.cc/EJ2G-PTKL>]. They explain that “[s]ince 2010, 501(c)(4) organizations have spent over \$800 million on political expenditures, compared to \$103 million in the previous decade.” *Id.* The Senators note that in 2016, 95 § 501(c) organizations spent \$50,000 or more on independent election expenditures, totaling \$185 million, and the ten largest of those ninety-five spenders were responsible for 77% of the total, while the top three were responsible for nearly half. *Id.*

158. See *Dark Money Basics*, *supra* note 149; see also *infra* note 180 and accompanying text.

that spending not only from the public but also from government regulators. The loss of this important oversight mechanism would make it much harder to detect abuses of the organizations' tax exemptions, or to determine whether foreign entities are using such organizations to conceal unlawful attempts to interfere in American elections.<sup>159</sup>

Anti-transparency groups, including organizations who unsuccessfully challenged the California and New York Schedule B requirements, are urging the IRS to adopt the proposed rule, arguing that existing disclosure requirements violate the First Amendment.<sup>160</sup> One has renewed the “novel theory” that donor disclosure requirements are “in and of [themselves]” First Amendment injuries, relying on the same flawed interpretations of *NAACP* and *Buckley* that the Ninth Circuit rejected.<sup>161</sup> Another has invoked general concerns about threats, harassment, and reprisals, including

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159. See 52 U.S.C. § 30121 (Supp. 2017) (prohibiting foreign nations from contributing to federal, state, and local elections); see also *Bluman v. FEC*, 800 F. Supp. 2d 281, 284 (D.D.C. 2011) (construing the foreign national ban expansively, including to prohibit foreign nationals “from making donations to outside groups when those donations in turn would be used to make contributions to candidates or parties or to finance express-advocacy expenditures”), *aff'd*, 565 U.S. 1104 (2012); Brendan Fischer, *Campaign Finance Law in the 21st Century*, in EXAMINING FOREIGN INTERFERENCE IN U.S. ELECTIONS: A REPORT FROM THE CAMPAIGN LEGAL CENTER 12 (2018), <https://campaignlegal.org/sites/default/files/2018-Report-interactive-pages.pdf> [<https://perma.cc/5WFX-PN6C>] (noting that foreign actors will continue to attempt to influence U.S. elections and that “loopholes exploited by foreign actors in the 2016 elections are certain to be used again”).

160. Institute for Free Speech, Comment Letter on Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations (Nov. 4, 2019), <https://www.regulations.gov/contentStreamer?documentId=IRS-2019-0039-1645&attachmentNumber=1&contentType=pdf> [<https://perma.cc/5MP8-HW88>] (asserting that compelled disclosure of financial contributors to civil society organizations is in itself a First Amendment injury); Americans for Prosperity, Comment Letter on Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations (Oct. 30, 2019), <https://www.regulations.gov/contentStreamer?documentId=IRS-2019-0039-1502&attachmentNumber=1&contentType=pdf> [<https://perma.cc/TPY2-XQHP>] (suggesting that donor disclosure has an unconstitutional “chilling” effect on free speech and association).

161. Compare Institute for Free Speech, *supra* note 160, with *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1312 (9th Cir. 2015) (rejecting CCP’s argument that disclosure requirement, “in and of itself,” harms First Amendment rights, and explaining that CCP’s theory “is not supported by [Ninth Circuit] case law or by Supreme Court precedent”).

“boycotts” and “public shaming,” while arguing that disclosure may discourage donations and “drain[] resources.”<sup>162</sup>

Efforts to change the law—like the reforms proposed in Michigan and adopted Mississippi and the proposed new IRS rule—underscore the multi-front assault being waged against disclosure rules by organizations and their funders who would prefer to keep their political spending secret. These attacks on disclosure receive broad support from anti-transparency groups, including the American Legislative Exchange Council (ALEC), a corporate-funded organization<sup>163</sup> that pairs state legislators with corporate lobbyists to craft “model bills” for introduction in the states.<sup>164</sup> Legal reform efforts are also aided by a parallel public messaging project that seeks to reduce public support for political transparency rules<sup>165</sup> by frightening people with dramatized stories about alleged disclosure-induced threats and harassment.

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162. Americans for Prosperity, *supra* note 160. But lack of resources is plainly not a problem for AFP: its funding is so substantial, it spent hundreds of millions of dollars on politics and policy during the 2018 election cycle alone. *See supra* note 132 and accompanying text.

163. *See* Form 990 from Am. Legislative Exch. Council 1, 9 (July 15, 2010), [https://pdf.guidestar.org/PDF\\_Images/2009/520/140/2009-520140979-064206f4-9.pdf](https://pdf.guidestar.org/PDF_Images/2009/520/140/2009-520140979-064206f4-9.pdf) [<https://perma.cc/NR5M-DBU7>] (reporting over \$5 million of ALEC’s revenue as coming from “other contributions, gifts, [and] grants”); *see also* Lisa Graves, *A CMD Special Report on ALEC’s Funding and Spending*, CTR. FOR MEDIA & DEMOCRACY’S PRWATCH (July 13, 2011, 7:54 AM), <https://www.prwatch.org/news/2011/07/10887/cmd-special-report-alecs-funding-and-spending> [<https://perma.cc/PQ5M-WG3D>] (“Almost 98% of ALEC’s funding comes from corporations like Exxon Mobil, corporate ‘foundations’ like the Charles G. Koch Charitable Foundation, or trade associations like the pharmaceutical industry’s PhRMA and sources other than ‘legislative dues.’ Those funds help subsidize legislators’ trips to ALEC meetings, where they are wined, dined, and handed ‘model’ legislation to make law in their state.”); Peter Overby, *Companies Flee Group Behind ‘Stand Your Ground,’* NPR (Apr. 13, 2012, 3:03 AM), <https://www.npr.org/2012/04/13/150528572/as-pressure-mounts-companies-flee-coalition> [<https://perma.cc/N6Y5-4V94>] (describing ALEC’s practice of developing bills “by having state legislators team up with corporate lobbyists” to craft legislation which “lawmakers take . . . home to introduce at their state capitols,” and noting that “corporate and foundation money” covers nearly all of the organization’s budget).

164. *See, e.g.,* Molly Jackman, *ALEC’s Influence over Lawmaking in State Legislatures*, BROOKINGS INSTITUTION (Dec. 6, 2013), <https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures> [<https://perma.cc/6FM9-N9VP>]; John Nichols, *ALEC Exposed*, NATION (July 12, 2011), <https://www.thenation.com/article/alec-exposed>; Nancy Scola, *Exposing ALEC: How Conservative-Backed State Laws are All Connected*, ATLANTIC (Apr. 14, 2012), <https://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869>.

165. *See* Sheely Edwards, *Bipartisan Poll Finds Voters Want Stronger Enforcement of Campaign Finance Laws, Increased Transparency in Elections*, CAMPAIGN LEGAL CTR. (Nov. 18, 2019), <https://campaignlegal.org/index.php/update/bipartisan-poll-finds-voters->

C. *Attacks on Political-Spending Transparency Through Misleading Public Messaging and Fear-Mongering*

A coordinated messaging campaign is disseminating ominous stories about the supposed consequences of political donor disclosure laws. Although documented cases of harassment stemming from the disclosure of a political contribution record are exceedingly rare, these messages combine misleading stories with fear-based anti-transparency appeals.

For example, a group called People United for Privacy disseminates professionally produced videos warning of the supposed “dangers” of transparency.<sup>166</sup> People United for Privacy’s videos often combine

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want-stronger-enforcement-campaign-finance-laws-increased [https://perma.cc/BU6N-696N] (finding that “[a] majority of voters rate ‘corruption in the political system’ as the most serious problem facing the country”).

166. See, e.g., People United for Privacy, *Supporting Causes Without Fear of Harassment and Intimidation*, FACEBOOK AD LIBR. (May 17, 2019), <https://www.facebook.com/ads/library/?id=343848039605693> [https://perma.cc/FH79-KQKK]; People United for Privacy, *Transparency Is for Government, Privacy Is for People*, FACEBOOK AD LIBR. (Mar. 21, 2019), <https://www.facebook.com/ads/library/?id=328470818014968> [https://perma.cc/P42M-MPMQ]. People United for Privacy is a product of closely linked and well-funded organizations that have been fighting against reasonable disclosure measures across the country for years. See, e.g., AM. LEGISLATIVE EXCH. COUNCIL, DONOR DISCLOSURE LEGISLATIVE TOOLKIT 3 (2017), <https://www.alec.org/app/uploads/2017/09/ALEC-Donor-Disclosure-Legislative-Toolkit-1.pdf> [https://perma.cc/FTY3-5Q8L] (laying out steps for donors to combat donor disclosure legislation); SEAN PARNELL, PHILANTHROPY ROUNDTABLE, PROTECTING DONOR PRIVACY: PHILANTHROPIC FREEDOM, ANONYMITY AND THE FIRST AMENDMENT 2 (2017), <https://www.philanthropyroundtable.org/docs/default-source/default-document-library/protecting-philanthropic-privacy-white-paper.pdf> [https://perma.cc/W5YM-376K] (describing People United for Privacy as an “initiative” of State Policy Network); Robert Faturechi, *The Conservative Playbook for Keeping ‘Dark Money’ Dark*, PROPUBLICA (Feb. 4, 2016, 12:45 PM), <https://www.propublica.org/article/the-conservative-playbook-for-keeping-dark-money-dark> [https://perma.cc/74FP-MGEC]. Organizations like the Competitive Enterprise Institute and the Institute for Free Speech, in turn, share and deploy People United for Privacy content in their own materials. See, e.g., Institute for Free Speech (@InstFreeSpeech), TWITTER (Dec. 18, 2017, 2:17 PM), <https://twitter.com/InstFreeSpeech/status/942836251736100865> [https://perma.cc/69K9-WHF6]; Richard Morrison, *Unite for Privacy and the First Amendment*, COMPETITIVE ENTERPRISE INST. (Feb. 17, 2017), <https://cei.org/blog/unite-privacy-and-first-amendment> [https://perma.cc/UJK6-EC57]. Leaders of organizations like the Goldwater Institute, ALEC, and FreedomWorks have provided testimonials for People United for Privacy’s videos. See, e.g., People United for Privacy, Testimonial of ALEC CEO Lisa B. Nelson, FACEBOOK AD LIBR. (Feb. 11, 2019), <https://www.facebook.com/ads/library/?id=2233850430188226> [https://perma.cc/P9S3-G8FB]; People United for Privacy, Testimonial of FreedomWorks President Adam Brandon, FACEBOOK AD LIBR. (Mar. 4, 2019), <https://www.facebook.com/ads/library/?id=852549738421369> [https://perma.cc/T97V-HWH5].

examples of political donors claiming to have experienced harassment as a result of their donations with frightening hypothetical consequences of donor disclosure.<sup>167</sup> But the most frequent examples of “harassment” that People United for Privacy and its allies deploy do not actually relate to political donor disclosure.

For example, one video claims that “[i]n Wisconsin, Cindy A. had her home raided for support of union reforms,” and that “Erious J. was profiled in Oregon after using a #BlackLivesMatter hashtag.”<sup>168</sup> The Cindy A. example receives additional emphasis in the longer *True Story: Wisconsin John Doe Victims* video featured on its YouTube page,<sup>169</sup> which features hauntingly lit footage depicting a pre-dawn raid and Cindy A.’s retelling of her home being searched one morning. But that raid had nothing to do with disclosure of her political donations. Instead, her home was searched in connection with a probe into bid-rigging during Scott Walker’s pre-gubernatorial tenure as county executive, when Cindy A. served as one of his top aides.<sup>170</sup>

Likewise, the “Erious J.” story has nothing to do with disclosing Erious J.’s political donations. As Oregon Public Radio describes, Erious J. was “caught up in digital surveillance by the [Oregon Department of Justice] because he used the #BlackLivesMatter hashtag

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167. See, e.g., People United for Privacy YouTube Channel, YOUTUBE, <https://www.youtube.com/channel/UCmaYrE5NxTrGZuB6sXUDwlQ> [https://perma.cc/X42L-BEHF] (last updated Dec. 20, 2019); *Spread the Word*, PEOPLE UNITED FOR PRIVACY, <http://unitedforprivacy.com/Videos/page/2> [https://perma.cc/MM8L-TXX7].

168. People United for Privacy, *Blacklisted*, FACEBOOK AD LIBR. (Apr. 25, 2019), <https://www.facebook.com/ads/library/?id=422863661606480> [https://perma.cc/G86D-33LQ]. This ad generated between 50,000 and 100,000 Facebook user impressions over three days. *Id.* People United for Privacy has also featured this video on Twitter. People United for Privacy (@UniteForPrivacy), TWITTER (Apr. 25, 2019, 10:06 PM), <https://twitter.com/UniteForPrivacy/status/1121596477824995328/video/1> [https://perma.cc/M4F4-G3LR].

169. People United for Privacy, *True Story: Wisconsin John Doe Victims*, YOUTUBE (Nov. 27, 2016), <https://www.youtube.com/watch?v=o9Owg0wuVyA> [https://perma.cc/3MGK-XDDB].

170. See, e.g., Jason Stein, Patrick Marley, Steve Schultze & Daniel Bice, *FBI Seizes Items at Home of Former Top Aide to Gov. Walker*, MILWAUKEE WIS. J. SENTINEL (Sept. 14, 2011), <http://archive.jsonline.com/news/statepolitics/129801878.html> [https://perma.cc/3ZTZ-QBMG]; Dave Umhoefer & Steve Schultze, *John Doe Investigation Looks into Bids to House County Workers*, MILWAUKEE WIS. J. SENTINEL (Jan. 25, 2012), <http://archive.jsonline.com/news/statepolitics/corruption-investigation-looks-into-bids-to-house-county-workers-0s3t07c-138020933.html> [https://perma.cc/7X9E-3JCG].

and tweeted the well-known logo of the rap group Public Enemy,” and he later sued the state for racial profiling.<sup>171</sup>

In another misleading video, “Darcy O,”<sup>172</sup> described being criticized and threatened during a high-profile case that involved the Goldwater Institute. “I walked away from this experience with a greater appreciation of the importance of being anonymous—of having your information be private,” she concluded in the video.<sup>173</sup> While “Darcy O.” may have been targeted based on her association with the Goldwater Institute, that association was not publicized because of her political donations. *She was CEO of the organization.* The people responsible for the activity described in the video identified her address through public property records.<sup>174</sup>

Anti-transparency stories like these also frequently exaggerate the consequences of a donor’s disclosure. In one commonly invoked example, we learn that Margie Christofferson “lost her job” after being disclosed as a donor to the pro-Proposition 8 ballot measure committee, which supported amending the California constitution to define marriage as only between a man and a woman.<sup>175</sup> Stories about Christofferson cite the loss of her job, boycotts of her restaurant, and public criticism she experienced. But even setting aside that boycotts and criticism are protected by the First Amendment,<sup>176</sup> these stories omit that Christofferson, who was the

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171. Andrew Dorn, *Johnson Says Oregon DOJ Didn’t Show ‘Loyalty’ in Civil Rights Case*, OPB (Oct. 16, 2017), <https://www.opb.org/radio/programs/thinkoutloud/segment/oregon-civil-rights-attorney-settlement-erious-johnson-interview> [<https://perma.cc/28UB-7ZDU>].

172. People United for Privacy, *Darcy’s True Story: Death Threats, Violence, and Intimidation*, YOUTUBE (Apr. 5, 2017), <https://www.youtube.com/watch?v=cGRl-gsqChQ&feature=youtu.be> [<https://perma.cc/9LC3-ZXKT>].

173. *Id.*

174. *See, e.g.*, John Marshall, *Goldwater Institute Files Lawsuit in Coyotes Deal*, ASSOCIATED PRESS (June 13, 2012), [http://www.eastvalleytribune.com/sports/goldwater-institute-files-lawsuit-in-coyotes-deal/article\\_b43e25b6-b584-11e1-99c2-001a4bcf887a.html](http://www.eastvalleytribune.com/sports/goldwater-institute-files-lawsuit-in-coyotes-deal/article_b43e25b6-b584-11e1-99c2-001a4bcf887a.html) [<https://perma.cc/E4K2-GM2D>]; Tracie Sharp & Darcy Olsen, *Beware of Anti-Speech Ballot Measures*, WALL ST. J. (Sept. 22, 2016), <https://www.wsj.com/articles/beware-of-anti-speech-ballot-measures-1474586180?mod=searchresults&page=1&pos=2> (stating explicitly that the “hockey fans used property tax records to find the home address of the institute’s president, Ms. Olsen, and post it online”).

175. *True Stories of Harassment and Intimidation*, PEOPLE UNITED FOR PRIVACY, <http://unitedforprivacy.com/true-stories-of-harassment-and-intimidation> [<https://perma.cc/H3MZ-YTU2>].

176. *See, e.g.*, *supra* notes 108–10 and accompanying text. As one article explained, many of the restaurant’s employees and customers were gay, and the boycott expressed opposition to Christofferson’s support for a ballot measure that would “strip their rights.” Lisa Derrick, *El Coyote Boycott? Mormon Manager’s Faith Overrides “Love” for*

restaurant owner's daughter, returned to her job after *voluntarily resigning* for a brief period—she was not fired as the references to “losing” her job imply.<sup>177</sup> Now, she owns the restaurant.<sup>178</sup>

Millions of political contribution records have been made public since the 1970s, yet as these examples illustrate, even groups that are highly motivated to highlight instances of harassment resulting from individuals' political contributions seem to have a difficult time finding legitimate examples.

#### CONCLUSION

More than half a century of Supreme Court jurisprudence conclusively establishes that the government may constitutionally require transparency about spending to influence the American political process. More precisely, ensuring transparency about election-related spending—including *who is bankrolling the groups that spend money on elections*—promotes First Amendment interests by allowing voters to make informed decisions at the ballot box.

The Supreme Court has also recognized that in certain narrow circumstances, groups that lack political or economic power may face such substantial threats or harassment as a result of complying with disclosure requirements that a disclosure exemption is necessary to protect the groups' ability to exercise their First Amendment right to associate. But such circumstances are limited and do not include donors' mere preference to remain anonymous. Nor are generalized fears of boycotts, protests, and other First-Amendment-protected counter speech an adequate basis to keep the sources of political spending secret. Powerful, well-funded organizations like AFP are not similarly situated to groups like the NAACP in the civil rights era or the Socialist Workers Party in the early 1980s. AFP and other large, highly

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*Customers*, HUFFPOST (Dec. 14, 2008, updated Dec. 6, 2017), [https://www.huffpost.com/entry/el-coyote-boycott-mormon\\_b\\_143605](https://www.huffpost.com/entry/el-coyote-boycott-mormon_b_143605) [<https://perma.cc/2HWE-YET6>].

177. Lisa Derrick, *Margaritas Flow Again: El Coyote Manager Resigns Over Prop 8*, HUFFPOST (Dec. 6, 2017) (“Christoffersen tendered her resignation to her mother, Grace Salisbury, described on El Coyote Web site as the ‘matriarch’ of the restaurant.”) [https://www.huffpost.com/entry/margaritas-flow-again-el\\_b\\_149457](https://www.huffpost.com/entry/margaritas-flow-again-el_b_149457) [<https://perma.cc/VE5B-LB2L>].

178. Jada Montemarano, *El Coyote Ramping Up for Annual Cinco de Mayo Festivities*, SPECTRUM NEWS (May 3, 2019), <https://spectrumnews1.com/ca/la-west/news/2019/05/03/el-coyote-prepares-for-massive-cinco-de-mayo-party> [<https://perma.cc/K2V9-8A52>].

influential organizations do not need “the special protection of anonymity in order for [their] voice[s] or views to be heard.”<sup>179</sup>

Finally, unique features of our current environment make effective political transparency requirements more critical today than ever before. Since the Supreme Court’s 2010 decision in *Citizens United*, it has become increasingly easy for corporations, special interests, wealthy individuals, and even foreign nationals to direct unlimited amounts of secret “dark” money into our elections.<sup>180</sup> The dramatic shift of political advertising away from broadcast media to the internet has also created new opportunities to conceal the sources of election spending, because many federal and state transparency laws have a digital blind spot that leaves most digital political ads unregulated.<sup>181</sup> These developments mean it is *already* too easy to evade transparency laws. Yet efforts to strengthen campaign finance transparency requirements through legislation and regulation remain in limbo,<sup>182</sup>

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179. Dale Ho, *supra* note 52, at 435 (making this point about “the U.S. Chamber of Commerce, with its three hundred thousand members representing three million businesses and \$140 million in annual contributions”).

180. For more detailed analyses of the origins and effects of dark money spending on American elections, see, e.g., Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the “Dark Money” Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y 383 (2013); Daniel C. Kirby, Note, *The Legal Quagmire of IRC § 501(c)(4) Organizations and the Consequential Rise of Dark Money in Elections*, 90 CHI.-KENT L. REV. 223 (2015); Dark Money Basics, *supra* note 149; Richard L. Hasen, *The Decade of Citizens United: It’s Hard to Overstate the Impact of This One Devastating Case on the Past 10 Years of American Politics*, SLATE (Dec. 19, 2019), <https://slate.com/news-and-politics/2019/12/citizens-united-devastating-impact-american-politics.html> [<https://perma.cc/QW5T-HYP>].

181. See, e.g., CAMPAIGN LEGAL CENTER, DIGITAL AD DISCLOSURE: STOP SECRET SPENDING IN THE DIGITAL WORLD, <https://campaignlegal.org/sites/default/files/2019-12/Toolkit%20-Digital%20Ad%20One%20Pager%20-%2011.21.pdf> [<https://perma.cc/KLR2-CA4C>]; Internet Communication Disclaimers and Definition of “Public Communication,” 83 Fed. Reg. 12864, 12865–68 (proposed Mar. 26, 2018) (describing existing rules for disclaimers on political ads and the FEC’s past application of disclaimer exemptions to certain internet ads); see also, e.g., Sara Swann, *The Struggle Is Real: FEC Stalled on Regulations for Online Political Ads*, FULCRUM (Aug. 22, 2019), <https://thefulcrum.us/open-government/fec-no-internet-ad-regulation> [<https://perma.cc/DGM3-EQDW>].

182. See For the People Act of 2019, H.R. Rep. No. 116-15, pt. 1 (2019); Ella Nilsen, *House Democrats Just Passed a Slate of Significant Reforms to Get Money out of Politics*, VOX (Mar. 8, 2019), <https://www.vox.com/2019/3/8/18253609/hr-1-pelosi-house-democrats-anti-corruption-mcconnell> [<https://perma.cc/KH3K-9TWC>] (reporting that H.R. 1, which includes provisions “aimed at getting money out of politics and increasing

while the multi-front assault on existing transparency regimes is escalating. It is thus more important now than ever to protect voters' First Amendment rights by ensuring that the *NAACP* exemption remains the narrow exemption it was intended to be, rather than a new mechanism for wealthy special interests to influence the political process in secret.

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transparency around donors" is "already dead on arrival in the Senate"); Swann, *supra* note 181 (discussing stalled FEC rulemaking for digital political ad disclaimers).